WORLD TRADE ORGANIZATION

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Negotiating Group on Rules Original: English

SUBMISSION FROM CANADA RESPECTING THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GATT 1994 (THE ANTI-DUMPING AGREEMENT)

The following communication, dated 27 January 2003, has been received from the Permanent Mission of Canada.

The Negotiating Group on Rules was instructed by Ministers at Doha to clarify and improve disciplines under the Agreement on the Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement or ADA). In proceeding with this mandate the Group is instructed to preserve the basic concepts, principles and effectiveness of the Agreement and to take into account the needs of developing and least-developed participants.

These tasks were given by Ministers "in the light of experience and of the increasing application of these instruments by Members...". This statement of fact reflects the seriousness of the challenges before this Group. On 1 January 1995, when the ADA came into effect, there were 730 definitive anti-dumping measures in place. As of July 2002 this number had grown to over 1100. Moreover, our experience with this Agreement in terms of the work undertaken by the Committee on Anti-Dumping Practices and the increasing number of dispute settlement panels, points to the broad divergences that exist in the interpretation and application of basic provisions of the ADA.

Canada is committed to making progress in clarifying and improving anti-dumping disciplines. Unjustified use of these measures can serve to impair core objectives of the WTO such as achievements in market access liberalization. Moreover, Canada believes that significant progress can be made in improving the disciplines while preserving the basic concepts, principles and the effectiveness of the Agreement in addressing injurious dumping.

The mandate of the Group instructs participants to identify negotiating issues including "disciplines on trade distorting practices". In this regard, it is noted that there are patterns of anti-dumping use worldwide that suggest there are systemic issues that, if addressed, could assist us in reversing the trend in trade remedy use. For example, two sectors, steel and chemicals, comprise well over 50 per cent of all anti-dumping actions. Also, there is a pattern of repetition whereby several countries are taking anti-dumping action against the same product from the same sources. This suggests that there may be policies both in the exporting and importing countries that increase the frequency of anti-dumping use. For example, government subsidization, highly protected domestic markets, and ineffective competition policy may promote discriminatory pricing practices that may lead to injurious dumping in export markets. On the other hand, government policies that fail to promote or, in fact, serve to impede competitive adjustment in domestic markets can lead to increased import sensitivity and more frequent recourse to anti-dumping laws.

In view of this, Canada is pursuing a two-pronged approach to negotiations in the area of anti-dumping:

1. The examination of key provisions of the anti-dumping agreement with a view to strengthening the disciplines so as to achieve greater international convergence of methodologies, greater predictability in the application of the rules, and to eliminate undue disruptions to international trade; and

2. identify options for addressing government activities and policies that may serve to promote injurious dumping practices.

The Ministerial Declaration also mandates an examination of developing country issues. In this respect, it should be noted that the proposals presented in this paper would benefit both developing and developed countries alike. Canada is also willing to discuss proposals for the consideration of the special circumstances of developing countries.

With the mandate from Ministers and these objectives in mind, Canada has identified the following issues as possible subjects for negotiation. They are categorized under three main headings: transparency and procedural fairness; clarifications to existing provisions; and improvements to the effectiveness of trade remedy measures. The submission focuses primarily on anti-dumping issues, but touches on some issues that overlap with the Agreement on Subsidies and Countervailing Measures (the ASCM) concerning countervailing measures. It does not purport to be an exhaustive enumeration of negotiating issues that Canada may wish to pursue.

I. TRANSPARENCY AND PROCEDURAL FAIRNESS

***General Objective**: Increase convergence among Members in the application of rules respecting transparency and procedural fairness to reduce the possibility of unsubstantiated action at any point in an anti-dumping investigation.*

***Underlying Concept/principle**: In the conduct of an anti-dumping or countervailing duty investigation, all interested parties should be adequately informed of the allegations against them and be given sufficient opportunity to defend their interests before investigating authorities that are fair and impartial.*

Existing rules and disciplines relating to the transparency and fairness of anti-dumping investigations should be strengthened in the following areas.

1. **Initiation Standards:** The requirements for the initiation of an anti-dumping investigation could be strengthened in various areas by, for example, defining the concept of information "reasonably available." In order to more closely parallel the scope of the injury investigation, consideration should be given to amending Article 5 to require that, when examining an application for the initiation of an investigation, authorities also consider information on factors other than dumping that may be contributing to the injury being alleged. The investigating authorities could also be explicitly required to conduct an "objective" assessment of the degree of industry support for an application and to refrain from taking any action that would have a foreseeable effect on the outcome of such a determination.

2. **Disclosure of Information:** The ability of interested parties to defend their interests in an anti-dumping investigation requires adequate knowledge of the case being made by parties adverse in interest. Consideration should be given as to how access to information might be improved to ensure that parties have a proper understanding of the matter. This might include

greater recourse to disclosure of information under protective order with appropriate penalties to discourage the misuse of such information.

3. **Public Hearings:** While Article 3 of the AD Agreement requires the injury determination to be based on "positive evidence" and on "an objective examination" of all relevant factors, it is silent on the issue of public hearings. Article 6, which sets out various procedural fairness requirements, is equally silent on the issue of hearings. Public hearings provide an important opportunity to test evidence in an adversarial and quasi-judicial setting. Hearings are especially important in injury determinations given the nature of the facts in issue. Consideration should, therefore, be given to including a requirement in Article 6 of the AD Agreement similar to Article 3 of the *Agreement on Safeguards*, which requires a public hearing or other appropriate means by which interested parties can present evidence and views, including the opportunity to respond to the submissions of other parties.

4. **Explanation of Determinations and Decisions:** The ability of a party to effectively defend its interests throughout an anti-dumping investigation depends, of course, on the sufficiency of explanations issued by the investigating authority of a Member for the decisions taken at each key stage of the process. Consideration should, therefore, be given to bolstering the information requirements in Article 12 of the AD Agreement in order to ensure greater transparency and procedural fairness.

II. CLARIFICATION

***General Objective**: Clarify and simplify the rules to promote the convergence of common practices in the conduct of investigations and the application of anti-dumping measures.*

***Underlying Concept/Principle**: The Anti-Dumping Agreement should provide predictable, consistent measures to counteract the injurious effects of dumped imports without unduly hindering legitimate trade.*

Several aspects of the ADA and ASCM require clarification in order to promote a greater international convergence in investigation methodologies and the application of anti-dumping and countervail measures.

1. **Ordinary Course of Trade:** Sales of like products in the domestic market can be rejected for purposes of establishing normal values if these sales are not made in "the ordinary course of trade" or, because of a "particular market situation", such sales do not permit a proper comparison. The Agreement provides no guidance as to what does not constitute "the ordinary course of trade", except for reason of price in Article 2.2.1, or what constitutes a "particular market situation". Members have interpreted and implemented these criteria in various ways to cover, for example, sales to related persons or sales made to a single customer in the domestic market. It would be useful to identify the manner in which Members have operationalized these criteria and to arrive at an agreement as to the conditions and circumstances of sales that are to be considered under these specific provisions.

2. **Profitability Test:** Article 2.2.1 permits the exclusion, under certain circumstances, of sales of like products in the domestic market that are not made in the ordinary course of trade by reason of price. This recognizes the principle that the margin of dumping should not be established on the basis of domestic sales that are unprofitable over an extended period of time.

   The test for profitability in Article 2.2.1 envisages that the transactions under consideration for the determination of normal value should recover their full costs within an extended

period of time, normally a period of one year, which typically coincides with the period of the dumping investigation. However, the test also recognizes that sales made at a loss at the time of sale should not be excluded if they do not occur in substantial quantities or if they ultimately recover their costs over a reasonable period of time.

It would be useful to explore the possibility of further expanding the conditions under which sales made at a loss would not be excluded for purposes of determining normal values. This has particular implications for those industries whose product pricing is extremely sensitive to shifts in supply and demand and for agricultural and other commodity sectors whose producers are typically "price takers" and who usually have fixed costs that cannot be easily reduced over the short term when there is a decline in selling prices.

3. **Cost Allocation:** Article 2.2.1.1 offers useful direction regarding the establishment of costs for purposes of Article 2 of the Agreement by providing, inter alia, that costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation. However, it must be recognized that the investigating authorities are typically required to establish or verify product costs that require the allocation of production costs, and administrative, selling and general expenses, to the specific product(s) under investigation. This may often necessitate costing information which the producer or exporter would not normally maintain other than for purposes of an anti-dumping investigation. It would be useful to provide more comprehensive direction concerning the determination and allocation of costs.

   In addition, it would be beneficial if the Agreement specifically provided for the determination of costs giving recognition to the type of manufacturing or production process used in respect of the goods under investigation. For example, certain production processes result in joint-production where multiple products, that may have significantly different sales values, are produced simultaneously using the same inputs and incur the same average production costs on a per unit basis. This occurs in industries such as chemicals, lumber, petroleum products, meatpacking and canneries. In such cases, an allocation of costs made on the basis of sales values results in a more meaningful comparison of costs to prices than an allocation of costs based on production volumes, provided that this allocation is made in accordance with generally accepted accounting principles.

4. **Like Product:** Article 2.6 of the ADA and footnote 46 of the ASCM define "like product" as a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. The definition of like products would benefit from clarification to limit the scope of product types that can be considered as a single "like product". This would help reduce the instances where products are grouped together and treated as the same product when they, in fact, compete in different markets.

5. **Domestic Industry:** The issue of like product also affects the determination of what constitutes the domestic industry, which is defined in Articles 4.1 and 16.1 of the ADA and ASCM, respectively, in part, "as the domestic producers as a whole of the like products, or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, …". The Articles are not clear with respect to what proportion of the domestic producers could be considered as constituting the domestic industry. It would be useful to provide more specific parameters as to what minimum percentage of the domestic production can be considered to be "a major proportion".

Article 5.4 of the ADA and Article 11.4 of the ASCM allow investigating authorities to initiate investigations on the basis of a petition by domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application, as long as those producers supporting the application account for at least 25 per cent of the total production produced by the domestic industry. Thus, an investigation may be initiated based on an application by producers that may represent as little as 25 per cent of the total domestic production of like products. The standing requirement for the initiation of an investigation should be discussed to determine whether the concept of "standing" is appropriately defined to ensure that domestic producers representing a relatively small proportion of the domestic production of like products cannot successfully apply for an investigation.

In a related issue, it would be desirable, in instances where an application is made on behalf of a domestic industry by one or more industry associations, that the members of the industry association(s) be identified in the application, with a statement of support for the application.

6. **Lesser Duty:** Article 9.1 of the ADA states that "… It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry." While some Members have incorporated lesser duty provisions in their domestic legislation, there is no mutually agreed methodology for determining a duty that is sufficient to remove the injury caused by dumping. Canada is of the view that before we consider wider application of lesser duty, as proposed by some members, the group should consider ways to provide appropriate methodologies for the calculation of a duty that is less than the full margin of dumping but which is adequate to remove the injury to the domestic industry. Such a methodology might also be useful in the application of price undertakings at a level sufficient to remove injury.

7. **ADA – ASCM Harmonization:** There are numerous divergences between similar provisions of the ADA and the ASCM. Consideration should be given to addressing these divergences in these negotiations so that, where appropriate, differences in similar provisions of the two agreements are eliminated.

8. **Sunset Reviews**: Anti-dumping and countervail measures are intended to provide temporary relief from the injurious effects of dumped or subsidized imports. The ADA and ASCM require that such measures be terminated after 5 years unless a review indicates that the expiry of the duty would be likely to lead to continuation or recurrence of dumping or subsidization and injury. However, even with these 5-year "sunset" reviews, in many jurisdictions, anti-dumping and countervailing measures may be kept in place for much longer periods of time. Consideration should be given to clarifying the circumstances that might lead to the continuation of a measure and providing an indicative list of factors that authorities should consider in determining whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping or subsidization and injury.

9. **Reviews:** Under the provisions of the ADA and the ASCM, administering authorities undertake a variety of review functions ranging from the review of individual importations (Articles 9 and 19, respectively) to 5-year "sunset" reviews to determine whether the measure should be extended beyond an initial or subsequent 5-year period (Articles 11 and 21, respectively). There is a great deal of debate as to which, if any, provisions of the ADA and ASCM related to initial investigations, also apply to the various review proceedings under the Agreements. In some instances the drafters of the Agreements felt it necessary to explicitly state that certain provisions of the ADA and ASCM with respect to initial investigations also specifically apply to reviews. For example, Article 11.4 of the ADA states that the provisions

of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. The Agreements should be clarified to stipulate which, if any, provisions that were originally intended to apply to initial investigations also apply to the various review provisions under the Agreements. In cases where, because of the fundamental differences between initial investigations and reviews, certain provisions of the Agreements cannot be reasonably applied to reviews, consideration should be given to providing rules that apply specifically to reviews.

10. **Codifying Recommendations and Decisions:** The Anti-Dumping Committee, through its Working Group on Implementation has completed several recommendations concerning mutually agreeable practices with respect to the application of the Anti-Dumping Agreement. Canada believes that this important work, as well as any further recommendations made during the course of these negotiations, should be codified in the Agreement.

Further, the Dispute Settlement Body, through dispute settlement panels and the Appellate Body, has interpreted numerous aspects of the ADA and ASCM. Members should consider whether some or all of these interpretations should be incorporated into the appropriate Agreement.

III. IMPROVEMENT

***General Objective**: These negotiations should aim to enhance the effectiveness of legitimate anti-dumping measures and limit the inconsistent, sometimes unwarranted, application of anti-dumping measures.*

***Underlying Concept/Principle**: Anti-dumping measures are intended to provide temporary remedial action against material injury to domestic producers resulting from the dumping of imports of clearly defined goods.*

1. **Initiation Standards:** There have been numerous disputes before the Dispute Settlement Body concerning whether the investigating authorities had sufficient cause to initiate an investigation. The improper initiation of an investigation can have serious detrimental effects on trade. In this regard, consideration should be given to whether, and under what conditions, initiations of investigations could be made subject to a swift dispute settlement procedure under the Understanding on the Settlement of Disputes.

2. ***De minimis* Margin of Dumping:** Article 5.8 of the ADA provides for the termination of an investigation where it is determined that the margin of dumping is *de minimis*. The *de minimis* dumping margin level is specified as less than 2 per cent. There continues to be a debate as to what the appropriate *de minimis* margin level should be. These negotiations should include consideration of the *de minimis* issue, with a view to making any adjustments to this provision applicable to imports from all Members.

3. **Repeated Dumping:** The increase in the use of anti-dumping measures indicates that there may be systemic issues that need to be addressed in order to reduce the need for, or use of, trade remedy measures. The underlying trade distorting practices that cause trade remedy responses need to be examined. In this respect, it would be useful for members to examine the issue of exporters of products that are found to be injuriously dumping a product in three or more other Member jurisdictions. Repeated dumping findings against the products of the same exporter and country may indicate an underlying practice or policy in the exporting country that should be addressed.

4. **Public Interest and Competition Policies:** Article 6.12 of the ADA, instructs members to provide opportunity for representations from industrial users and consumer organizations regarding the evidence of dumping, injury and causality. While this obligation is limited in scope, many members have taken steps to allow interested parties to submit relevant arguments on a broad range of economic issues related to the imposition of anti-dumping duties. Key issues, which are often referred to as public interest issues, may include the possibility of supply shortages, increasing prices to industrial users and consumers, and competition policy concerns.

   In Canada's view, efforts to improve the ADA should include an examination of the unintended effects of anti-dumping action and efforts to strengthen existing provisions of the Agreement so as to fully consider the consequences of anti-dumping duties for broader economic, trade and competition policy concerns.

5. **Duty Refunds:** Under the present agreements, adverse DSB decisions are implemented on a prospective basis. At the present time, the Agreements do not specifically direct Members to return duties or duty deposits that were collected pursuant to what is eventually found to be a WTO inconsistent measure. Consideration should be given to having special dispute settlement provisions for the ADA and ASCM in cases where the imposition of duties under these agreements has been found to be inconsistent with the provisions of the relevant agreement. These new provisions would require the return of anti-dumping and countervailing duties or duty deposits in cases where a Member's compliance action with a DSB decision results in the measure being withdrawn, or a partial return of duties or duty deposits where the amount of duties/deposits that would have been collected under a WTO-compliant measure is less than the amounts actually collected.

6. **Duty Imposition:** Article 9.3 of the ADA provides for the assessment of anti-dumping duties on either a retrospective or prospective basis. The different assessment methodologies have fundamentally different effects on trade. Negotiations should include a discussion of this issue with a view to creating more predictable duty enforcement systems so that exporters and importers can operate in a more certain environment, while providing the requisite protection from material injury to the domestic industry. This would help reduce uncertainties in the market and more readily allow for the resumption of non-injurious trade.

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